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8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**

10 MODE MEDIA CORPORATION,
11 f/k/a GLAM MEDIA, a Delaware
12 corporation;

13 Plaintiff,

14 v.

15
16 JOHN DOE 1, as registrant of the
17 GLAMSCOOP.ORG domain name;
18 and JOHN DOES 2-10;

19 Defendants.
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Case No. 3:16-cv-00244-RS

**ORDER GRANTING MODE MEDIA'S
EX PARTE MOTION FOR:**

**(1) A TEMPORARY RESTRAINING
ORDER WITHOUT NOTICE AND
ORDER TO SHOW CAUSE WHY
PRELIMINARY INJUNCTION SHOULD
NOT ISSUE;**

**(2) LEAVE TO SERVE DEFENDANT
JOHN DOE 1 VIA HIS PRIVACY
PROTECTION PROXY AGENT; AND**

**(3) LEAVE TO CONDUCT EARLY
DISCOVERY PRIOR TO A RULE 26(f)
CONFERENCE**

1 Plaintiff Mode Media Corporation (“Mode Media”) seeks an *ex parte* temporary
 2 restraining order (“TRO”) pursuant to Federal Rule of Civil Procedure 65 and Civil Local
 3 Rules 7-10 and 65-1, and under the Lanham Act (15 U.S.C. §§ 1116 *et seq.*). For good
 4 cause shown, Mode Media’s *ex parte* motion is GRANTED.

5 **A. *Ex Parte* Temporary Restraining Order**

6 A TRO may be granted upon a showing “that immediate and irreparable injury, loss,
 7 or damage will result to the movant before the adverse party can be heard in opposition.”
 8 Fed.R.Civ.P. 65(b)(1)(A). The purpose of such an order, as a form of preliminary injunctive
 9 relief, is to preserve the status quo and prevent irreparable harm “just so long as is necessary
 10 to hold a hearing, and no longer.” *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*,
 11 415 U.S. 423, 439, 94 S.Ct. 1113, 39 L.Ed.2d 435 (1974). A request for a TRO is evaluated
 12 by the same factors that generally apply to a preliminary injunction, *see Stuhlberg Int’l.*
 13 *Sales Co. v. John D. Brushy & Co.*, 240 F.3d 832, 839 n. 7 (9th Cir.2001), and as a form of
 14 preliminary injunctive relief, a TRO is an “extraordinary remedy” that is “never granted as
 15 of right.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24, 129 S.Ct. 365, 172
 16 L.Ed.2d 249 (2008). “Under the *Winter* test, the moving party must establish that: (1) it is
 17 likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of
 18 preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the
 19 public interest.” *Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1124 (9th Cir. 2014).
 20 Federal Rule of Civil Procedure 65(b) permits courts to issue a TRO without written or oral
 21 notice to the adverse party if (1) the moving party will suffer “immediate and irreparable
 22 injury, loss, or damage will result to the movant before the adverse party can be heard in
 23 opposition”; and (2) “the movant’s attorney certifies in writing any efforts made to give
 24 notice and the reasons why it should not be required.”

25 Mode Media has submitted its registrations for the trademarks to GLAM, BRASH,
 26 and TEND, which serves as prima facie evidence of ownership and exclusive right to use
 27 the mark. *See* 15 U.S.C. § 1115(a); *Pom*, 775 F.3d at 1124. Mode Media has also
 28 introduced screenshots of GlamScoop.org’s website alongside screenshots of its own. A

1 comparison of the two websites reveals striking similarities, and therefore a strong
2 likelihood that the public would be confused. *See Pom*, 775 F.3d at 1125 (listing the
3 *Sleekcraft* factors, including the likelihood of confusion). In addition, Mode Media has
4 submitted evidence that suggests defendants are intentionally concealing their identities and
5 going out of their way to place the allegedly infringing content on another server once the
6 host removed the content from the website. *See Pietz Decl.* ¶ 10.

7 Mode Media has also demonstrated a likelihood of confusion tends to cause
8 trademark holders to lose control of their business reputation and good will—all forms of
9 harm. In addition to showing likelihood to confusion, Mode Media has demonstrated that it
10 has tried numerous times to stop defendants from posting the offending material on their
11 website. Mode Media has sent numerous letters to website servers, requesting the server to
12 remove GlamScoop.org's content. When the content was removed, however, defendants
13 found another server to host the website. *Pietz Decl.* ¶ 10. That defendants seek and find
14 new servers to host their content suggest they are willfully seeking to infringe upon Mode
15 Media's trademarks.

16 There is little evidence to suggest that the equities tip in defendants favor.
17 Everything in the record suggests that defendants are willfully appropriating and using
18 Mode Media's content. Nor is there evidence that defendants are engaged in legitimate
19 business activities. Thus, the balance of equities tips in favor of Mode Media.

20 Finally, the public interest favors issuing a TRO. "In trademark cases, the public
21 interest is the public's right not to be deceived or confused. Indeed, 'the most basic public
22 interest at stake in all Lanham Act cases [is] the interest in prevention of confusion,
23 particularly as it affects the public interest in truth and accuracy.'" *Warner Bros. Entm't v.*
24 *Glob. Asylum, Inc.*, No. CV 12-9547 PSG CWX, 2012 WL 6951315, at *23 (C.D. Cal. Dec.
25 10, 2012) *aff'd sub nom. Warner Bros. Entm't v. Glob. Asylum, Inc.*, 544 F. App'x 683 (9th
26 Cir. 2013) (quoting *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 730 (3d Cir. 2004)).
27 Where, as here, the plaintiff shows that there is a likelihood of consumer confusion, an
28 injunction to prevent that confusion is in the public's interest. *Id.*

1 In addition to showing immediate and irreparable harm, Media Mode has made a
2 sufficient showing that it has tried and failed to serve notice of this temporary restraining
3 order. Mode Media does not know the defendants' identities, despite its efforts to find out.
4 Mode Media has figured out that defendants are using a privacy proxy service, but absent a
5 court order, the privacy proxy service and servers will not assist with service. *See Pietz*
6 Decl. ¶¶ 3-6. Thus, Mode Media has satisfied Rule 65(b)'s requirements for issuing a TRO
7 without notice.

8 Accordingly, it is ORDERED:

9 a. the GlamScoop.org domain name be placed on lock and hold, such that
10 control over the domain name is frozen by the registrar for the pendency of this litigation;

11 b. all evidence related to the claims at issue in this action, including
12 records relating to Internet hosting accounts used to host the website located at
13 GlamScoop.org be preserved, which will include placing and maintaining all user and/or
14 account information for the registrant of the GlamScoop.org domain name, including
15 metadata, server data, network data, records of IP addresses for account logins, contact
16 information, and billing information, on a legal hold during the pendency of this litigation.

17 c. Mode Media need not post a bond and need not appear at a hearing
18 because there appears to be "no realistic likelihood of harm to [GlamScoop.org] from
19 enjoining" the website. *Jorgenson v. Cassiday*, 320 F.3d 906, 919 (9th Cir. 2003).

20 d. This order shall become effective at 3:00 p.m. on Friday, January 15,
21 2016.

22 **B. Alternative Service**

23 To effect service of process, parties have options. Federal Rule of Civil Procedure
24 4(e)(1) permits parties to "follow[] state law for serving a summons in an action brought in
25 courts of general jurisdiction in the state where the district court is located or where service
26 is made." Pursuant to Rule 4(e)(2), parties may also serve process by "delivering a copy of
27 the summons and of the complaint to the individual personally; leaving a copy of each at
28 the individual's dwelling or usual place of abode with someone of suitable age and

1 discretion who resides there; or delivering a copy of each to an agent authorized by
2 appointment or by law to receive service of process.” *Id.* As Mode Media has filed its
3 claims for relief in the Northern District of California, it may serve process by filing a
4 motion to direct service “in a manner which is reasonably calculated to give actual notice to
5 the party to be served and that proof of such service be made as prescribed by the court.”
6 Cal. Civ. Proc. Code § 413.30. Service by email is reasonably calculated to give defendants
7 notice. *See Rio Props. Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1017 (9th Circ. 2002);
8 *Facebook, Inc. v. Banana Ads, LLC*, No. C-11-3619 YGR, 2012 WL 1038752, at *3 (N.D.
9 Cal. Mar. 27, 2012) (holding that service of process by email was reasonably calculated to
10 provide actual notice because the foreign and domestic defendants were involved in
11 commercial internet activities). Mode Media has not been able to identify John Doe 1’s
12 email address, but it has found the next-best thing: the privacy protection proxy service. To
13 use the privacy proxy service, defendants had to give the service contact information. Pietz
14 Decl. ¶¶ 4-6. Thus, Mode Media has demonstrated that service via the proxy service is
15 reasonably calculated to effect service.

16 Leave is hereby GRANTED and Mode Media is ORDERED to serve on John Doe 1
17 via the privacy protection proxy service online form that is associated with GlamSnoop.org,
18 the following documents:

- 19 a. the requested TRO;
- 20 b. the complaint in this action;
- 21 c. a summons directed, as per the caption, to “John Doe 1, as registrant of
22 the GlamScoop.org domain name”;
- 23 d. this order, pursuant to which the John Does are also hereby ORDERED
24 TO SHOW CAUSE as to why a preliminary injunction should not be issued. Specifically,
25 the John Does must show cause as to why, for the duration of this action: (i) the terms of the
26 TRO should not remain in effect, and (ii) GlamScoop.org should not be disabled at the
27 domain name server (“DNS”) level and they should not be enjoined from further
28 infringement of Mode Media’s trademarks or other intellectual property rights, whether via

1 re-enabling GlamScoop.org name, or by using, registering, or trafficking in any other
2 domain name, Internet website, or other method. Defendants shall appear at a hearing on
3 Mode Media's motion for a preliminary injunction on January 29, 2016 at 10:00 a.m. in
4 Courtroom 3.

5 **C. Leave to Engage in Early Discovery**

6 Use of "John Doe" defendants is generally disfavored. *Gillespie v. Civiletti*, 629 F.2d
7 637, 642 (9th Cir. 1980). When plaintiffs have tried to uncover the defendant's identity and
8 failed, however, plaintiffs should have the opportunity to obtain discovery for the limited
9 purpose of identifying the defendant. *Id.* Mode Media seeks subpoenas to third-parties
10 who host or have hosted GlamScoop.org and the privacy proxy service John Doe 1
11 supposedly uses. Mode Media has documented its efforts to identify John Doe 1 and shown
12 that there is good cause to permit limited discovery in order to ascertain the John Does'
13 identities.

14 Accordingly, leave is hereby GRANTED to Mode Media to conduct early discovery
15 prior to a Rule 26(f) conference, that is designed to identify and serve the John Doe
16 defendants, as follows:

17 a. serving a third party subpoena on each hosting company that the John
18 Does have used in connection with hosting GlamScoop.org;

19 b. serving a third party subpoena on the registrar for GlamScoop.org;

20 c. serving a third party subpoena on the privacy proxy service that John
21 Doe 1 used to hide his or her identity while registering GlamScoop.org;

22 d. serving follow-up subpoenas based on returns made on prior subpoenas
23 that are necessary to identifying the John Does so they can be named in their true names and
24 served with the summons and complaint;

25 e. provided, however, that all such early third party subpoenas authorized
26 by this order are subject to the following limitations:

27 i. early discovery and any responsive information received may be
28 used only for the purpose of identifying the defendants and prosecuting this action;

1 ii. any subpoena recipient that is a cable service provider, or that
2 wishes to do so, may give its subscribers notice of the subpoena, and at least 21-days to
3 move to quash the subpoena or seek a protective order before any return is made thereon;

4 iii. the only information which Mode Media may request without
5 seeking additional Court approval is contact information, IP addresses logs, non-content
6 metadata (such as the type of device used to login), and/or billing account information for
7 the suspected John Doe defendants who are somehow associated with GlamScoop.org.

8 IT IS SO ORDERED.

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10 DATED: January 15, 2016

BY: 

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12 Richard Seeborg, United States District Judge
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